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In the

Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as COMMISSIONERS OF THE INDIANA UTILITY REGULATORY COMMISSION,
Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT SOUTHERN INDIANA GAS AND ELECTRIC COMPANY'S BRIEF IN SUPPORT OF PETITION

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CORPORATE DISCLOSURE STATEMENT

Southern Indiana Gas and Electric Company ("SIGECO") is a wholly-owned subsidiary of Vectren Utility Holdings, Inc., which is a wholly-owned subsidiary of Vectren Corporation (NYSE: "VVC"). SIGECO has no subsidiaries.

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Respondent Southern Indiana Gas and Electric Company ("SIGECO") respectfully requests that this Court grant the petition for writ of certiorari and review the Seventh Circuit's opinion in this case. Because SIGECO supports the position of petitioners, the Commissioners of the Indiana Utility Regulatory Commission ("IURC"), this brief in support is being filed in accordance with Sup. Ct. R. 12.6 (1999).

STATEMENT

SIGECO supplements petitioners' Statement to clarify SIGECO's role in the dispute between Midwestern Gas Transmission Company ("Midwestern") and the Commissioners, and to highlight certain undisputed facts that conflict with what the Seventh Circuit erroneously *assumed* about the industry and the parties before it.

SIGECO is a natural gas local distribution company ("LDC") regulated by the IURC. The IURC has granted SIGECO a necessity certificate to distribute natural gas to end-use consumers within a southwestern Indiana territory. Several interstate pipelines, *including Midwestern*, deliver natural gas to SIGECO, and SIGECO then provides retail distribution of that gas to end-use consumers within its territory. Grain Processing Corporation ("GPC") and Scepter, Inc. ("Scepter") are located within SIGECO's territory.

With rare exceptions, SIGECO does *not* sell gas to large industrial end-use consumers. Instead, as a state-regulated LDC, SIGECO must provide unbundled local distribution (delivery) service to any large customer within its assigned territory that requests and qualifies for such service. Before Scepter contracted to build and operate its own pipeline to receive local distribution service from Midwestern, SIGECO provided that local delivery service to Scepter. SIGECO was not selling gas to Scepter. Nonetheless, SIGECO had constructed and operated facilities to provide Scepter's local distribution service – facilities

which now lay idle and impose "stranded costs" on SIGECO ratepayers. Before GPC opened its Indiana facility, Midwestern contracted to build facilities for, and to provide GPC with, local distribution of natural gas purchased from out-of-state third parties. Thus, GPC has not to date invoked SIGECO's obligation to provide local delivery service to GPC.

SIGECO brought Midwestern's violations of Indiana law to the IURC's attention in petitions that requested the IURC to undertake enforcement actions, pursuant to Ind. Code § 8-1-2-115, and issue orders to Midwestern to cease and desist direct delivery of natural gas to GPC and Scepter unless and until Midwestern complied with Ind. Code §§ 8-1-2-87 and 87.5 by seeking a certificate of necessity from the IURC. SIGECO also petitioned the IURC to enforce Ind. Code § 8-1-2-87.5(b)(3) by ordering Scepter to cease and desist from transporting gas across property other than its own without a certificate of necessity from the IURC. Other IURC-regulated utilities intervened to be heard in the enforcement proceeding concerning Midwestern's service to GPC. SIGECO did not seek any individualized relief. Its petitions invoked the investigatory and prosecutorial power of the IURC. *See* Ind. Code § 8-1-2-54.

Midwestern named SIGECO as a defendant in its complaint to the district court. SIGECO supported the Commissioners' request for abstention pursuant to *Younger v. Harris* in the district court and on appeal.

REASONS FOR GRANTING THE WRIT

Like the petitioners, SIGECO urges this Court to review the opinion of the Seventh Circuit and correct that circuit's direct conflict with this Court's precedents in *Younger v. Harris*, 401 U.S. 37 (1971) and *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

A federal district court faced with a request to enjoin an ongoing state enforcement proceeding involving an important state interest must abstain absent "extraordinary circumstances." *Younger*, 401 U.S. at 45, 53. Although this Court has left open the possibility that a state's attempt to enforce "flagrantly and patently" unconstitutional law *might* justify entry of an injunction despite *Younger*, *NOPSI*, 491 U.S. at 366-67, this possible exception requires a claim of unconstitutionality beyond dispute, "such that no reasonable judge could disagree." Pet. 15. This certainly is not such a case, given the Natural Gas Act's ("NGA's"), 15 U.S.C. § 717 *et seq.*, express reservation of states' authority over all aspects of "local distribution" of gas and all "facilities" used for such local distribution, and given the unbroken eighty-year line of Supreme Court precedent recognizing the states' vital interests in this area. Pet. 17-19. Disregarding the NGA's reservation of state power and the important state interests in the regulation of utility service to in-state consumers, and overriding principles of federalism and comity protected by this Court, the Seventh Circuit reversed the district court's decision to abstain based upon a finding that the Indiana law governing local gas delivery by pipeline companies "seems" to be preempted. *Id.* at 12-13.

As the district court recognized, "[t]he line between federal and state regulatory jurisdiction over such bypass arrangements has considerable importance in the natural gas industry and to consumers, both large and small." App. A 11a. The Seventh Circuit, in its hasty rejection of state regulatory interests, failed even to address the key statutory reservation of state power and, as the petition shows, created

standards that conflict directly with this Court's decisions in *Younger* and *NOPSI*. As shown below, the Seventh Circuit's opinion was also based on fundamental misconceptions of the natural gas industry and its regulation. For these reasons as well, the court's opinion demonstrates the "danger of allowing a court faced with a *Younger* abstention question to resolve the merits of preemption on a 'quick look' before deciding whether to abstain." Pet. 11.

I. The Seventh Circuit's Preoccupation With The National Market For The *Sale* Of Gas Is Both Misplaced And Wrong.

In today's natural gas market, suppliers around the country compete to sell gas directly to end-use consumers. Gas can be purchased anywhere, so long as transportation can be arranged. While gas and interstate transportation can be purchased together as a "bundled" product from LDCs or from middlemen ("marketers"), large industrial customers commonly purchase gas and transportation separately, acquiring the interstate transportation services they need directly from pipeline companies. *General Motors Corp. v. Tracy*, 519 U.S. 278, 303 (1997).[1] Pipeline companies are *not* permitted to sell gas. Thus, interstate pipelines do not compete with LDCs for the sale of gas.

The Seventh Circuit's opinion sweeps away states' interests in regulating local gas *distribution* services and facilities – as well as the NGA's express reservation of this state power – based on the extraordinary and erroneous premise that states might be aiding LDCs in an effort to restrict the sources or locations from which large end-users *buy their gas*. But in light of fundamental, undisputed and correct market facts, LDCs (and the states in which the LDCs operate) *have no interest in controlling* where industrial

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[1] For further detail on the evolving natural gas market, *see generally* Order No. 637, 65 Fed. Reg. 10155, 10184 (Feb. 25, 2000) and *United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

customers shop for their gas. Moreover, as a result of its errors, the court of appeals' opinion would *restrict*, not open, the natural gas market it says it is protecting.

A. LDCs provide end-use consumers with broad access to suppliers in the competitive national market for the sale of natural gas.

When an end-use consumer shops the national gas market, it can consider buying natural gas from any source with access to a pipeline or series of pipelines that eventually connects with the LDC in the consumer's area. LDCs typically are served by *multiple* pipelines. For example, SIGECO receives gas from suppliers in various regions of the country through at least four interstate pipelines, *including Midwestern*. See Supplemental Appendix at sa1 (United States Energy Information Administration map depicting pipelines that serve Indiana) and sa2 (similar map depicting pipelines that serve the Midwest). Some of these pipelines, such as Texas Gas Pipeline Company, transport gas from producers in the Gulf of Mexico area, while others, such as Midwestern, transport gas from the Chicago "hub" and from Canadian pipelines and producers. The gas commodity is fungible, but prices often vary by region.

Contrary to the court of appeals' misconception, SIGECO reaps no economic advantage from a retail customer's selection of one pipeline over another. However the gas arrives, SIGECO makes money only on its local distribution of the gas, not on any aspect of the out-of-state purchase or on carriage of the gas by interstate pipelines.

Because LDCs are the largest customers of interstate pipelines' transportation services and are usually a necessary last step in the transport of gas from supplier to retail customer, any interstate pipeline close enough to an LDC's service territory to serve LDC customers has had a strong economic motive to connect to the LDC. Thus, subject to operational restrictions, consumers like [illegible]PC and Scepter

that are within SIGECO's delivery area can (1) purchase gas from any supplier that transports gas on Midwestern's pipeline *or* on other pipelines that connect to SIGECO, (2) purchase interstate pipeline transportation to the SIGECO local distribution system, and (3) purchase local distribution service from SIGECO.[2]

GPC and Scepter are not receiving local distribution service from the LDC, choosing instead to have gas distributed to them directly by only one pipeline, Midwestern. The result is that GPC and Scepter can purchase gas *only from those suppliers who, by virtue of geography and contract, have access to Midwestern's pipeline.* If SIGECO were providing the local distribution, GPC and Scepter could access all those suppliers *in addition to* suppliers with access to other pipelines connecting to SIGECO's distribution system.

B. State regulation does not restrict competition in the sale of gas, but the bypass does.

The Seventh Circuit erroneously assumed that allowing the IURC to regulate Midwestern's direct retail distribution to Indiana consumers would allow the state to "take control of the interstate market in natural gas," because "[i]f SIGECO can persuade the Indiana commission to forbid Midwestern to deliver the gas, these purchasers will have to rescind their purchases and instead buy from an affiliate of one of the pipelines with which SIGECO has a contract." App. A 7a. But this notion that Midwestern is not connected to SIGECO's system is nonsense. No party has disputed or could dispute the district court's finding that, in addition to

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[2] The first step, the purchase of gas, has been deregulated pursuant to the Natural Gas Policy Act of 1978 and the Natural Gas Wellhead Decontrol Act of 1989, both codified at 15 U.S.C. § 3301 *et seq.*; the second step, the transportation from wellhead to the LDC, is regulated by the Federal Energy Regulatory Commission; and the final step, local distribution by the LDC, is regulated by the individual state regulatory agencies.

other pipelines: "Midwestern's pipeline is also connected to the SIGECO distribution system. SIGECO receives gas transported by Midwestern and then distributes that gas to SIGECO's customers, including residential, commercial, and industrial users." App. B 14a.

This was not an incidental error. The Seventh Circuit's misguided concern about protecting the Congressionally-mandated interstate market in the *sale* of gas is *fundamental* to its decision. Thus, it erroneously holds that Indiana's laws regulating the bypass are "mere defiance of clear federal law." *See* App. A 7a-8a. Ironically, Midwestern's direct local distribution to GPC and Scepter through bypass *constricts* the open market the court claims to be shielding from state interference. Contrary to its stated purpose, the court of appeals endorses locking those customers into purchasing only from suppliers with access to Midwestern's pipeline.

II. The Seventh Circuit Disregards Critical State Interests In The Regulation Of Retail Gas Distribution.

As petitioners explained, this Court has unwaveringly appreciated the vital state interests in regulation of utility service to retail consumers. Pet. 17-19. Before and after enactment of the NGA, this Court has carefully divided state and federal regulation of the interstate natural gas market by recognizing the states' responsibility for regulating the "local business" and "essentially local concern" of direct local service to retail consumers. *See, e.g., Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 309 (1924); *Pennsylvania Gas Co. v. Pub. Serv. Comm'n*, 252 U.S. 23, 28 (1920); *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 521 (1947); *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951).

This case and other disputes over state versus federal regulatory power have arisen because pipeline companies

have *chosen to enter the business of direct, local gas delivery*. Pipeline companies have sought to contract with large industrial customers to "bypass" the LDC and deliver the gas from the source directly to the end-user – *i.e.*, to provide both interstate transportation and direct local distribution of the gas. Like the LDC, the bypassing pipeline company (or its customer) builds local distribution facilities that have no function whatever *other than* the local delivery of gas. As with the LDC, the local delivery facilities used by the pipeline company can be built only by tearing up streets and fields – often alongside preexisting LDC facilities. Although these pipeline companies have elected to perform the same function or act of local distribution as the LDCs, with the same local effects and consequences, the pipeline companies claim they are not subject to state regulation of this local aspect of their business.

Through its misguided preoccupation with the interstate market in natural gas sales – a market in no way jeopardized by state regulation of an interstate pipeline's retail distribution of gas to end-use consumers – the court of appeals disregarded this Court's precedents recognizing the importance of local interests in gas delivery. The Seventh Circuit did not address the state's right and need to deal with the unnecessary local burden of Midwestern's construction of facilities to serve Scepter that *duplicate* SIGECO's existing facilities. The court did not consider that if GPC grows unhappy with Midwestern's distribution service or wants to purchase gas from a supplier *not* able to transport on Midwestern's pipeline, it can demand that SIGECO provide this service. SIGECO, which is required by the IURC to serve all interested customers in its territory, would have to construct new, duplicative, local distribution facilities to serve GPC.

The court of appeals similarly gave no answer to the concern that Scepter is *not* a FERC-regulated utility. FERC approved only Midwestern's tap or connection to Scepter's intrastate pipe. If the Commissioners are enjoined from enforcing Ind. Code 8-1-2-87.5(b)(3), then Scepter owns and

is transporting gas over Indiana soil through pipeline facilities that are *not regulated by either federal or state government. But see* 15 U.S.C. § 717(c) (the "Hinshaw Amendment," confirming state regulatory authority over such intrastate transmission facilities).

These uniquely local concerns are at the heart of this Court's recognition of the need for state regulation of local gas distribution. The NGA expressly reserved this power for the states. It is a grossly insufficient treatment of these local concerns for the court of appeals to assert that SIGECO, a private party, should have asserted these and any other interests of Indiana citizens before federal regulators.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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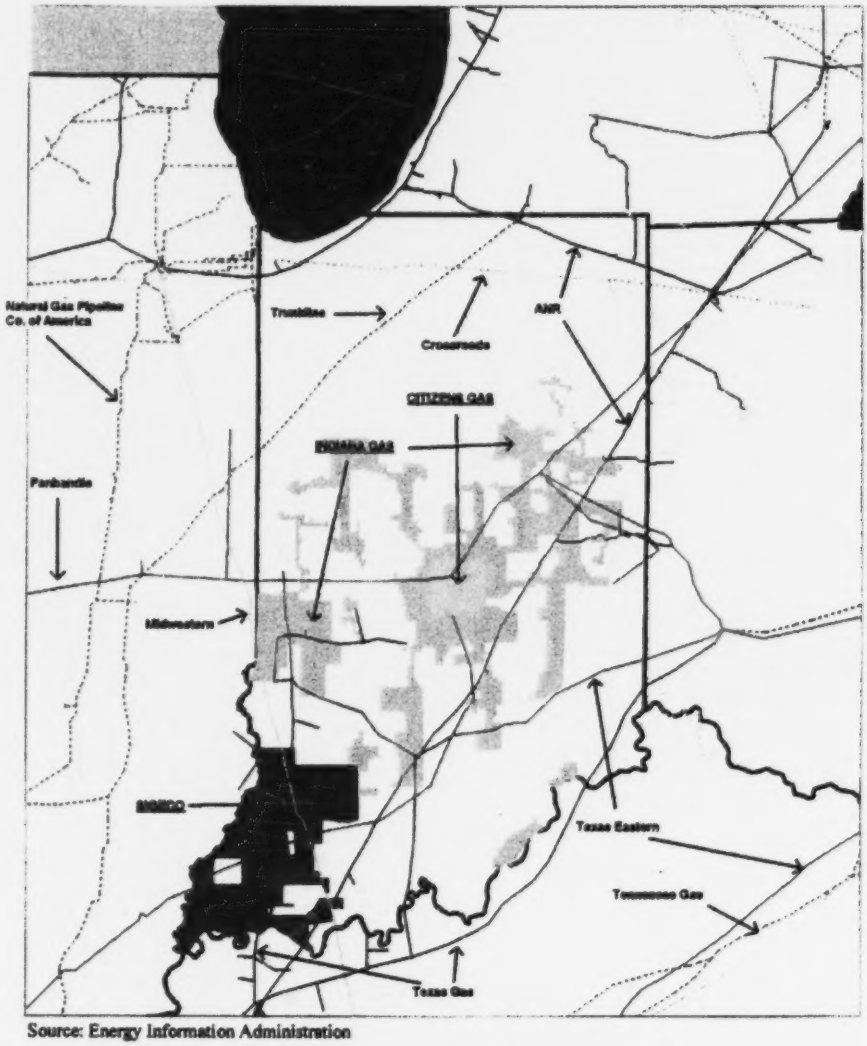

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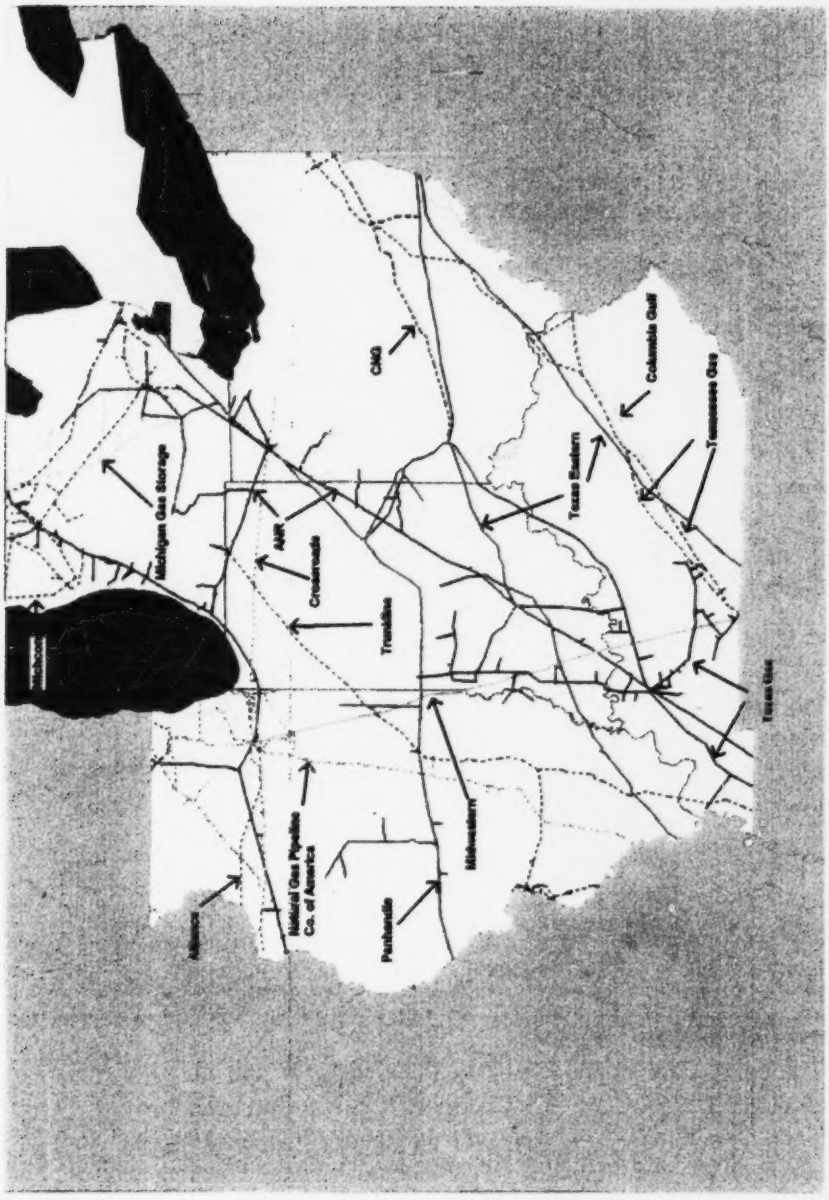

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